Supreme Court, U.S.
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No. 06-299

In the
Supreme Court of the United States

WILLIAM F. HEGGER,

Petitioner,

v.

VISTEON AUTOMOTIVE SYSTEMS, INC., and FORD MOTOR CO.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES L. HARRIS
Counsel of Record

2400 CRESTMOOR ROAD
SUITE 324
NASHVILLE, TN 37215
(615) 386-7143

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTION PRESENTED FOR REVIEW

Did not the Sixth Circuit panel err in holding that the record did not reveal one or more genuine issues of material fact within the meaning of Rule 56 of the Federal Rules of Civil Procedure, thereby impermissibly permitting the entry of summary judgment predicated on matters of intent, motive, perception, and/or party witness credibility?

A LIST OF ALL PARTIES TO THE PROCEEDING AND AFFILIATIONS AS REQUIRED BY SUPREME COURT RULE 29.6

All parties involved are named in the caption. There are no parent companies nor any nonwholly owned subsidiaries within the meaning of Supreme Court Rule 29.6.

TABLES OF CONTENTS

page

Question Presented for Review i

A List of All Parties to the Proceeding and Rule 29.6 Statement ii

Tables of Contents iii

Table of Authorities iv

Opinion Below 1

Concise Statement Jurisdiction 1

Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations Involved in the Case 2

Concise Statement of the Case 3

Reasons for Granting the Petition 4

Conclusion 5

Appendix

Appendix A - Sixth Circuit Opinion Dated 6/2/06 . . . . . 1a

Appendix B - District Court Memorandum Granting Defendant's Motion for Summary Judgment Dated 1/3/05 . . . . . 11a

TABLE OF AUTHORITIES

page

Cases

Hafford v. Seidner,
183 F.3d 506 (6th Cir. 1999) 4, 5

Kerzer v. Kingly Mfg. Co.,
156 F.3d 396 (2d Cir. 1998) 4

Lam v. University of Hawaii,
40 F.3d 1551 (9th Cir. 1994) 4

Noble v. Brinker Intern., Inc.,
391 F.3d 715 (6th Cir. 2004) 4

Sartor v. Arkansas Natural Gas,
321 U.S. 620 (1944) 5

U.S. v. L.E. Cooke,
991 F.2d 336 (6th Cir. 1993) 4

Statutes

28 U.S.C. § 1252 1

28 U.S.C. § 1331 3

42 U.S.C. § 2000e 2

Federal Rules of Civil Procedure

Rule 56 . . . . . 2, 4

Rules of the United States Supreme Court

Rule 12.5 1

Rule 29.4 1

Rule 29.6 ii

Other Authorities

Moore's Federal Practice § 56.15[3] 4

Wright, Miller & Kane, *Federal Practice and Procedure: Civil 3d* § 2726 4

Wright, Miller & Kane, *Federal Practice and Procedure: Civil 3d* § 2732.3 4

OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit was not recommended for full-text publication.

CONCISE STATEMENT OF THE BASIS OF THE JURISDICTION OF THE UNITED STATES SUPREME COURT

1. The United States Court of Appeals for the Sixth Circuit issued its written opinion on June 2, 2006.

2. There is no Order respecting rehearing, nor is there any Order granting an extension of time to file the petition for a writ of certiorari.

3. Supreme Court Rule 12.5 is not applicable to this petition for the writ of certiorari in that this is a petition for the writ of certiorari predicated on errors made by the United States Court of Appeals for the Sixth Circuit. The statute conferring United States Supreme Court jurisdiction over the instant controversy is believed by the petitioners to be 28 U.S.C. § 1252.

4. In that neither the United States nor any department thereof is a party to these proceedings, the provisions of Supreme Court Rules 29.4[b] and [c] are not applicable.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

42 U.S.C. § 2000e-2[a][1],[2]. Unlawful employment practices.

[a] Employer practices

It shall be unlawful for an employer-

[1] to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, or national origin; or

[2] to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Rule 56[b],[c], Federal Rules of Civil Procedure. Summary Judgment.

[b] For Defending Party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

[c] Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

CONCISE STATEMENT OF THE CASE

Federal jurisdiction in the United States District Court for the Middle District of Tennessee was founded on 28 U.S.C. § 1331, in that this is a suit for money damages occasioned by racial discrimination in violation of Title VII. William Hegger went to work for these defendants at the Nashville Automotive Glass Plant in 1996 The racial discrimination relevant to the case *sub judice* involves both direct discrimination, largely distinctions of discipline, and a hostile work environment evidenced principally by racial epithets. Merely by way of example, Mr. Hegger suffered an ersatz application for work with Rev. Jesse Jackson and a Ku Klux Klan card put in his personal workspace provide a vivid but by no means complete example of just exactly how truly hostile the plaintiff's work environment was. The hostile work environment aspect of this matter was a continuing issue. In Mr. Hegger's judgment, white employees were treated differently – less severely - in matters of employee discipline than he, and other African-American employees.

REASONS FOR GRANTING THE PETITION

The difficulty with the Opinion of the Sixth Circuit is that it serves to place judicial *imprimatur* on a District Judge having substituted his judgment for that of the jury in a Rule 56 context. That is impermissible. Under most circumstances, clearly including those presented here, lawsuits that rise or fall on questions of motive, intent, or perception[s] of a party are definitionally inappropriate for summary judgment. Wright, Miller & Kane, *Federal Practice and Procedure: Civil 3d* § 2732.3; *see also, e.g., Lam v. University of Hawaii,* 40 F.3d 1551 at 1560ff. (9th Cir. 1994); *Kerzer v. Kingly Mfg. Co.,* 156 F.3d 396 at 400 (2d Cir. 1998); *Hafford v. Seidner,* 183 F.3d 506 at 513ff. (6th Cir. 1999).

Appellate courts construing Rule 56 standards consistently hold that where, as here, the outcome hinges in whole or in part on state of mind, intent, or witness credibility, summary judgment should not be granted. Perhaps an even greater problem than that of motive/intent/perception is the critical importance of witness credibility, most particularly in circumstances like the instant case where perception and credibility are inextricably intertwined. Where there exists doubt as to the credibility of a material witness – not to mention a party – summary judgment is never appropriate. Wright & Miller, *Federal Practice and Procedure: Civil 3d* § 2726; *Moore's Federal Practice* § 56.15[3]. There is no better-settled rule than that where dispositive motions are concerned, "...witness credibility is solely within the jury's province, and [courts] may not...make credibility determinations." *U.S. v. L.E. Cooke Co.,* 991 F.2d 336 at 343 (6th Cir. 1993); *Noble v. Brinker Intern., Inc.,* 391 F.3d 715 at 724 (6th Cir. 2004). This court's observation that "...a summary disposition...should be on evidence which a jury would not be at liberty to disbelieve..." is of no less value

today than it was sixty-one years ago. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 at 624 (1944) There is no need to belabor the matter. The motives and credibility of the parties are matters of fact for the jury, not matters of law for the court. In the case *sub judice,* for whatever reason or reasons, the Sixth Circuit either ignored or misconstrued these linchpin principles. In the concluding paragraph of the Sixth Circuit's Opinion, the author, District Judge Cook, flatly held (in speaking for the entire panel) that the record disclose genuine issues of material fact. That could be true only if District Judge Haynes did that which was in effect read the collective mind of a corporate defendant employer. That is precisely what Judge Haynes did. It was, and remains, reversible error. There can be no serious doubt but that the Sixth Circuit's Opinion in this case is squarely at odds with the rules enunciated in the Second and Ninth Circuits, and at least in some degree with its own reasoning as articulated in *Hafford.*

CONCLUSION

For these reasons, concepts of fundamental fairness require that the Petition for Certiorari be granted.

Respectfully submitted,

James L. Harris (TN BPR #014173)
Counsel of Record
2400 Crestmoor Road, Suite 324
Nashville, TN 37215
(615) 386-7043
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-5256

[Filed June 2, 2006]

WILLIAM F. HEGGER,	)
Plaintiff-Appellant	)
	)
v.	)
	)
VISTEON AUTOMOTIVE SYSTEMS, INC.	)
And FORD MOTOR Co.,	)
Defendants-Appellees	)
	)

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
03-00657
William J. Haynes, Jr., U.S. District Judge

Before: SILER, GRIFFIN, Circuit Judges; COOK, District Judge.*

* The Honorable Julian Abele Cook, Jr., United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

COOK, District Judge. The Plaintiff-Appellant, William F. Hegger, appeals the grant of a summary judgment by the district court in favor of the Defendants-Appellees, Visteon Automotive Systems, et al. On the basis of the record, we affirm the entry of the summary judgment and deny Hegger's appeal.

I.

On July 22, 2003, Hegger filed a complaint in the United States District Court for the Middle District of Tennessee, in which he accused his employers, Visteon Automotive Systems, and the Ford Motor Company, as well as his union, United Auto Workers International, of (1) race and age discrimination, (2) racial harassment and hostile work environment, (3) acts of retaliation in the form of disparate measures of discipline, (4) a deliberate failure to hire and/or promote him in violation of existing law, and (5) an undeserved constructive discharge from his employment.[1]

On January 3, 2005, the district court granted Visteon's motion for the entry of a summary judgment after concluding that Hegger had failed to proffer a sufficiency of evidence upon which to support his claims of disparate treatment under Title VII of the Civil Rights Act of 1964 ("Title VII"), the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-401 et seq ("THRA"), and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 and 623(d)("ADEA"). The district

[1] In 2000, Visteon became a wholly owned subsidiary of the Ford Motor Company. Hegger and other hourly employees of Ford at the time of this corporate realignment were loaned to Visteon.

court also determined that his Title VII discriminatory claims neither occurred within the applicable limitations period nor were supported by any set of facts which would be sufficient to satisfy a judgment under Title VII, the THRA, or the ADEA. This appeal followed.

II.

Hegger, an African American, began his employment with the Ford Motor Company in 1996 at its Glass Plant facility in Nashville, Tennessee. During the course of his employment, he filed two charges of unlawful racially discriminatory conduct by his employers with the Equal Employment Opportunity Commission ("EEOC"); one in 1998 and the other in 2002. When Hegger filed his first EEOC charge in 1998, he detailed a series of incidents between August 26, 1996 and February 7, 1998 which served as the bases for his complaints.[2] Although he was issued a right-to-sue letter by the EEOC, no lawsuit was ever filed by him within the designated statutory framework. In 2002, Hegger filed another charge with the EEOC, contending that his employers had subjected him to unlawful employment decisions on the basis of his race and age.

During the period of time between the filing of these two EEOC charges, Hegger had been disciplined by his employers on three separate occasions for absenteeism. There was also evidence presented to the district court that the human

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[2] The incidents that were referenced by Hegger in the 1988 EEOC charge included his receipt of, among other things, (1) an unwanted handwritten card from the Ku Klux Klan, and (2) unsolicited sexually explicit jokes from some unidentified co-workers.

resources personnel department ("HRPD") had received complaints from fellow-employees which indicated that Hegger had exhibited some strange and inappropriate behavioral patterns in and around the workplace. As a consequence, he was (1) placed on paid medical leave in accordance with the collective bargaining agreement and (2) required to undergo a psychological exam. Upon returning to work, Hegger attended a disciplinary hearing, in which he was assessed a thirty day suspension.[3]

III.

As an appellate court, we must review the entry of a summary judgment by utilizing a *de novo* standard of review. *See Kocak v. Community Health Partners of Ohio,* 400 F.3d 466, 468 (6th Cir. 2005); *Farhat v. Jopke,* 370 F.3d 580, 587-88 (6th Cir. 2004). However, the "summary judgment will be affirmed if 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact' as to an essential element of the non-moving party's case." *Farhat,* 370 F.3d 580, 587 (6th Cir. 2004)(quoting Fed.R.Civ.P. 5(c)). "An issue of fact is 'genuine' if a reasonable person could return a verdict for the non-moving party." *Id.* (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). Finally, "the party bearing the burden of proof must present a jury question as to each element of its case." *Sharma v. Ohio State University,* 25 Fed. App'x. 243, 246 (6th Cir. 2001).

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[3] Inasmuch as Hegger had already incurred a thirty day paid leave, it was treated as "time served" which enabled him to resume his work immediately.

Although Hegger timely filed this lawsuit on the basis of his claims arising out of the 2002 EEOC charge, these allegations improperly included incidents that had been a part of the 1998 EEOC charge. As such, we will only review Hegger's disparate discipline claims under Title VII and THRA by utilizing the traditional summary judgment framework.[4]

IV.

Title VII of the Civil Rights Act of 1964 prohibits an employer from "discriminating against any individual . . . because of such individual's race, color, religion, sex or national origin . . . ." 42 U.S.C. § 2000e-2. In 2001, we declared that the "plaintiff in a Title VII case bears the initial burden of proving discrimination by the defendant." *Sharma v. Ohio State University,* 25 Fed. App'x. 243, 246 (6th Cir. 2001). Thus, a Title VII plaintiff may "satisfy this burden by presenting direct evidence of discrimination actions by the defendant or by showing the existence of circumstantial evidence that creates an inference of discrimination." *Id.* at 247.

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[4] In Hegger's brief, he stated, "Appellant's claims . . . are predicated on [Title VII]. For the purposes of this appeal, William Hegger takes no position on the dismissal of his ADEA and Family Medical Leave Act ("FMLA") claims. [However,] pendent jurisdiction for plaintiffs claims under [the THRA] also attaches." Appellant Br. 7. Although not entirely clear from a reading of his brief, it appears that Hegger is only challenging the summary judgment decision by the district court as it relates to his Title VII and THRA claims.

1. Direct Evidence

In a direct evidence case, the plaintiff must present "direct testimony that the employer acted with a discriminatory motive." *Birch v. Cuyahoga County Probate Court,* 392 F.3d 151, 172 (6th Cir. 2004). Direct evidence requires a conclusion by the fact finder that unlawful discrimination was at least a "motivating factor" for the employer's actions. *Terbovitz v. Fiscal Court of Adair County,* 825 F.2d 111, 114-15 (6th Cir. 1987). If the plaintiff is successful in demonstrating the existence of unlawful discriminatory conduct by the employer, the burden of persuasion shifts to the defendant to show that the challenged employment tenure would have been terminated even if it had not been motivated by discrimination. *Jacklyn v. Schering-Plough Healthcare Products Sales Corp.,* 176 F.3d 921, 926 (6th Cir. 1999).

In this case, Hegger is unaware of the identity of those persons who, in his judgment, are responsible for the alleged discriminatory conduct at his workplace. Moreover, Hegger has been unable to present any evidence which links the decisions by management to the conduct about which he has complained. Although he contends that the thirty-day suspension for his alleged bizarre behavior was the product of a racial animus, it appears from the record that the employer proffered a facially legitimate business reason for its administrative action. Rather than imposing another thirty day suspension period upon him, the company essentially considered his medical leave as "time served." Contrary to Hegger's position on this issue, it suggests that his employer was accommodating and displayed sensitivity under these circumstances.

Consequently, we conclude that Hegger has failed to establish that (1) an act of unlawful discrimination was at least

a motivating factor in his employer's decision to administratively discipline him or (2) the company acted with a discriminatory motive. Accordingly, Hegger has failed to proffer any direct evidence of illegal discriminatory conduct by Visteon.

2. Circumstantial Evidence

In order to survive the entry of a summary judgment in a Title VII claim through the use of circumstantial evidence, the plaintiff must show that he (1) is a member of a protected class, (2) was subjected to an adverse employment action, (3) was qualified, and (4) was treated less favorably than a similarly situated employee outside the protected class. *Sharma,* 25 Fed. App'x at 247. "Once the plaintiff has established a *prima facie* case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. If the defendant does so, the burden shifts back to the plaintiff to prove the reason advanced is pretextual." *Id.* (citations omitted). Those claims that arise under the THRA "are analyzed under the same framework as those under Title VII." *Rhea v. Dollar Tree Stores, Inc.*, 395 F. Supp. 2d 696, 2005 WL 2600213, at 7 (W.D. Tenn. 2005)(citing *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 31 (Tenn. 1996)).

As a preliminary matter, Hegger's Title VII allegations are limited to those claims that were asserted by him in his 2002 EEOC charge because he neglected to exercise his right to file a law suit under the 1998 EEOC charge in a timely

manner.[5] *See* 42 U.S.C. § 2000e-5(f)(1); *Zipes v. Trans World Airlines,* 455 U.S. 385, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982). Significantly, Hegger has not argued that his 1998 EEOC charge falls under any of the recognized exceptions to the statute of limitations. Moreover, he does not contend that the allegations within the 2002 EEOC charge constitute a "continuing violation" of the 1998 EEOC charge. *See Valentino v. United States Postal Serv.,* 218 U.S. App. D.C. 213, 674 F.2d 56, 65 (D.C. Cir. 1982)(to demonstrate continuing violation, plaintiff must show "a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during the [limitations] period").

Accordingly, in light of the facts and circumstances surrounding the 2002 EEOC charge, it is clear that Hegger has not established any viable claim under Title VII. *See Gerlach v. Michigan Bell Telephone Co.,* 501 F. Supp. 1300, 1322 (E.D. Mich. 1980)("the claims in the judicial complaint must be like or related to the allegations contained in the EEOC charge"). The 2002 EEOC charge contains an assertion that his employer undertook retaliatory measures against him during a six week period (September 1, 2002 and October 20, 2002) on the basis of his race. Hegger's allegation of disparate discipline are legally and factually deficient.

In pursuit of this issue, Hegger submits that "appellate courts construing Rule 56 standards consistently hold that where, as here, the outcome hinges squarely on state of mind,

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[5] Although the district court based its summary judgment decision, in part, on this issue, Hegger neither challenged nor addressed this point in his appeal.

or intent, or perception, or witness credibility, summary judgment should not be granted." However, he has neglected to proffer *any* evidence which would suggest that his employer acted in a discriminatory manner. Despite having claimed that white co-workers were treated differently from him, he has been unable to identify any white fellow employee who, though similarly situated, was treated differently.

Even if Hegger had satisfied the prima facie requirements of a Title VII violation, he has not asserted any argument that would rebut his employer's nondiscriminatory reasons for the adverse employment action which addressed his absenteeism record, as well as the complaints from fellow-employees about his questionable behavior while in the work place. In fact, Hegger has acknowledged that he did not have his supervisor's permission to leave the plant on any of the three occasions for which he was disciplined. It is our conclusion that the discipline enacted against Hegger was in accord with the progressive policy of the plant for attendance. It is important to note that de minimis employment actions are not materially adverse and, thus, they are not actionable. *Ford v. GMC,* 305 F.3d 545, 553 (6th Cir. 2002). The imposition of discipline against an employee for absenteeism according to company policy is not a materially adverse employment action. *Walker v. Thompson,* 214 F.3d 615, 629 (5th Cir. 2000)(*de minimis* loss of pay did not rise to level of adverse employment action). Therefore, a review of the facts which surround the relevant events suggests that each action taken by Visteon was warranted.[6]

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[6] Although Hegger's brief is not clear as to whether he has conceded his hostile environment claim under Title VII, we have concluded that this allegation should fail for the same reasons given

A. Retaliation Claim

In order to establish a prima facie case of unlawful retaliation under Title VII, a plaintiff must demonstrate, by a preponderance of the evidence, that (1) this statute protects the activity in which he was engaged, (2) his employer knew that he was engaged in this protected activity, (3) an employment action, which was adverse to the plaintiff was undertaken by his employer, and (4) there exists a causal connection between the protected activity and the adverse employment action. *Abbott v. Crown Motor Co. Inc.*, 348 F.3d 537, 542 (6th Cir. 2003). Hegger has not offered any evidence which suggests that he was engaged in a protected activity. As a consequence, Hegger's retaliation claim must necessarily fail.

V.

In noting that Hegger has not set forth any evidence - direct or circumstantial - which satisfies the disparate discipline framework, this Court agrees with the decision by the district court to grant a summary judgment in favor of the employer because we also believe that there are no genuine issues of a material fact to be resolved. Accordingly, and for the reasons that have been set forth above, we affirm the decision of the district court in this litigation.

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above. *See Rhea v. Dollar Tree Stores, Inc.*, 395 F. Supp. 2d 696, 2005 WL 2600213, at 4 (W.D. Tenn. 2005).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 3:03-0657

[Filed January 3, 2005]

WILLIAM F. HEGGER, Plaintiff	)
v.	)
VISTEON AUTOMOTIVE SYSTEMS, INC., a/k/a VISTEON CORPORATION FORD MOTOR COMPANY, UNITED AUTO WORKERS INTERNATIONAL, UNITED AUTO WORKERS LOCAL 737, Defendants	)

ORDER

Plaintiff, William F. Hegger, filed this action under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e *et seq.*, the Tennessee Human Rights Act ("THRA"), Tenn. Code. Ann. § 4-21-401 *et seq.*, the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 and 623(d) and Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 1985. The Defendants Visteon Automotive Systems, Inc., a/k/a Visteon Corporation Ford

Motor Company, United Auto Workers International and United Auto Workers Local 737 (the "Union Defendants"), are respectively Plaintiff's former employer and his union at that employment. The Unions Defendants were dismissed by separate Order. (Docket Entry No. 50).

Before the Court is the Defendant Visteon's motion for summary judgment (Docket Entry No. 30) to which Plaintiff has responded. With few objections as to the relevance and the three objections to non-material facts, the Plaintiff does not otherwise dispute the Defendant's Statement of Undisputed Facts about the timeliness of certain critical events. The Court therefore adopts as the facts for this motion, Plaintiff's responses to the Defendants' Statement of Undisputed Facts except those to which Plaintiff objected and disputed. (Docket Entry No. 43). The latter assertions are not material.

Upon a motion for summary judgment, the factual contentions are viewed in the light most favorable to the party opposing the motion for summary judgment. *Duchon v. Cajon Co.*, 791 F.2d 43, 46 (6th Cir. 1986) *app.* 840 F.2d 16 (6th Cir. 1988) (unpublished opinion). As will be discussed *infra*, upon the filing of a motion for summary judgment, the opposing part must come forth with sufficient evidence to withstand a motion for directed verdict, *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-52 (1986), particularly where there has been an opportunity for discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The Court concludes that there are material factual disputes, thus, this section does not constitute a finding of facts under Fed. R. Civ. P. 56(d).

In sum, most of the events at issue occurred prior to 1998. Visteon contends that given the undisputed facts and the charges in Plaintiff's administrative charge filed with the

Equal Employment Opportunity Commission ("EEOC"), Plaintiff's Title VII claims either exceed the scope of his charge and are time barred. For the exhausted claim in Plaintiff's 2002, EEOC administrative charge, Plaintiff has not presented evidence to support his claim of disparate treatment under Title VII of the THRA or the ADEA. In his response, Plaintiff argues only that the conduct after 1999 is actionable under 42 U.S.C. § 1981 that has a four years limitations period, citing *Jones v. R&R Donnelley and Sons*, 124 S.Ct. 1836 (2004).

Based upon the undisputed facts and the Plaintiff's response, the Court concludes that Plaintiff's exhausted Title VII claims did not occur within the applicable limitations period and otherwise are not supported by sufficient facts to support a judgment under Title VII, the THRA nor the ADEA.

The record does not establish any claim in Plaintiff's pleadings under 42 U.S.C. § 1981 nor has Plaintiff sought to amend his complaint to assert these claims, despite the Defendants' motion for summary judgment on the untimeliness of Plaintiff's other claims.

Accordingly, the Defendants' motion for summary judgment (Docket Entry No. 30) is GRANTED and Plaintiff's claims against the Defendants Visteon Automotive Systems, Inc., are DISMISSED with prejudice.

This is the Final Order in this action.

It is so ORDERED.

ENTERED this the 3rd day of January, 2005

/s/ _____
WILLIAM J. HAYNES, JR.
United States District Judge